

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34527

MAUMEE & WESTERN RAILROAD COMPANY AND RMW VENTURES LLC–
PETITION FOR DECLARATORY ORDER–CSX TRANSPORTATION, INC.
CROSSING RIGHTS AT DEFIANCE, OH

RESPONSE OF CSX TRANSPORTATION, INC.

PUBLIC

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CSX Transportation, Inc. (“CSXT”) opposes the relief sought by Maumee & Western Railroad Company (“M&W”) and RMW Ventures LLC (“RMW”) (jointly referred to as “Petitioners”) in the Petition for Declaratory Order filed on July 16, 2004 (the “Petition”). Instead, CSXT contends that the Surface Transportation Board (the “Board”) can provide a solution to M&W’s operating needs without reducing CSXT’s velocity on its main east-west line between the Chicago gateway and the northeastern markets.

CSXT offers to construct an interchange track and to enter an operating agreement with M&W, both of which would permit M&W to cross CSXT’s main line without requiring CSXT to reduce the velocity of its east-west trains. In advance of construction, M&W would have to provide a plan, which includes the source of funds, to repair its line that crosses CSXT to at least FRA Class I condition and to maintain the line to at least FRA Class I condition. See maps in Exhibit 1.

BACKGROUND

CSXT and its predecessor railroads have been operating through Defiance, OH on a continuous basis since the late 1800's. Through the early 1970's the Baltimore & Ohio Railroad Company (the "B&O") operated over a double track main line through Defiance, OH.¹ Today, CSXT's rail line through Defiance, OH is double track, FRA Class IV (60 mile per hour speed limit), and runs in essentially an east-west direction. The No. 1 Main is the northern track and the No. 2 Main is south of the No. 1 Main and parallel to it.

It seems that there has always been a crossing of CSXT's line near milepost BI 88. The latest agreement governing the crossing was an Agreement dated as of October 22, 1979 between one of CSXT's predecessors and the Norfolk and Western Railway Company ("N&W") Exhibit 2).

In 2000, M&W stopped using the crossing diamonds to cross CSXT's track. Instead, M&W requested CSXT to provide it with a detour arrangement, which CSXT did for over 18 months. In mid-2002, CSXT recognized that M&W had not used the crossing for over 18 months, that M&W had embargoed a substantial portion of its line south of the CSXT line, and that M&W had requested CSXT to donate rail and ties to permit M&W sufficient material to repair 15 miles of track. Taking these factors into consideration, CSXT notified M&W that it would remove the diamonds. M&W's Petition contains the correspondence between CSXT and M&W concerning the removal of the diamonds.

¹ The existence of the roadbed from the B&O double track permitted CSXT to complete the process of building the double track on this line in 18 months.

CSXT recognized that if it removed the diamonds that it would obtain several benefits including an increase in the velocity of its trains, reduced capital expenses, and reduced maintenance costs.

Under CSXT's Speed Policy at Railroad Crossings, CSXT was restricted to operating over the Defiance diamonds at 40 miles per hour on a 60-mile per hour track. Reducing CSXT's speed from 60 miles per hour to 40 miles per hour to cross the diamonds increased a train's time by four minutes. Four minutes for one train seems inconsequential, but when it is considered that CSXT averages about 52 trains per day over the diamonds, a four minute increase in the time a train is on the track becomes a minimum of 208 minutes per day. Reducing the availability of even a double track by over three and one-half hours per day substantially reduces the capacity of the specific tracks and the national rail system. Removal of the diamonds allowed CSXT to increase the velocity of its trains.

Crossing diamonds on high speed track, such as CSXT's line through Defiance, OH, have a useful life of about three years. Diamonds are expensive to replace. Replacing the diamonds in Defiance would cost CSXT about \$275,000 every three years. In addition to the capital cost, replacing diamonds requires advance ordering. Because the number of diamond manufacturers has declined, it is CSXT's experience that it takes about 18 months to receive a new diamond from the time it is ordered.

Not only are the diamond crossings expensive to replace, they are expensive to maintain. It requires about 750 person-hours per year to maintain the crossing diamonds, at a cost of between \$35,000-\$45,000 per year.

After the diamonds were removed and CSXT and M&W failed to resolve their dispute, M&W filed the Petition with the Board. The parties believed that this dispute could be resolved through mediation and requested the Board to assist in mediation on August 4, 2004. The parties exchanged correspondence trying to focus the issues in dispute. However, Petitioners withdrew from mediation by a letter dated March 4, 2005. CSXT believed that a face-to-face discussion with an impartial mediator would allow the parties to resolve this matter. CSXT still believes that mediation can resolve this matter, especially in light of CSXT's proposed solution.

In this response to the Petition, CSXT is including verified statements from Charles Martin, Thomas Thoburn, and Steven Davis.

CSXT'S POSITION

CSXT opposes all of the relief sought by Petitioners. Petitioners have not justified the relief they seek. Instead CSXT offers the solution described above and detailed below.

CSXT's double tracking of its mainline track, including the portion near Defiance, OH did not interfere with M&W's common carrier rail service. Indeed, it was merely replicating the double track structure that the B&O had previously used in that location. CSXT's double tracking of its main line was fully justified based on future traffic and competitive situations as detailed in Mr. Martin's Verified Statement. As Mr. Martin testifies, the single track through Defiance had a capacity of 33 trains per day, while the double track today handles 52 trains per day on average.

When CSXT double tracked its line, it did not remove the diamond that allowed M&W to cross CSXT. Instead, CSXT constructed new diamonds that allowed M&W to cross both of

CSXT's tracks in Defiance. It is an inaccurate statement by M&W that CSXT's construction of a second track interfered at all with M&W's common carrier obligation.

At the time CSXT removed the diamonds in Defiance; it did not and could not interfere with M&W's operations because there were none. When CSXT removed the diamonds, M&W had not operated across the CSXT line for over 18 months. Moreover, in response to FRA citations, M&W had embargoed a substantial portion of its railroad. Finally, M&W had requested CSXT provide it with rail and ties to repair 15 miles of railroad free of charge, which CSXT refused to do. Mr. Thoburn explains that these were the reasons the diamonds were removed. In addition, CSXT obtained a number of benefits from the removal of the diamonds, which included increased velocity on its main line, reduced capital costs, and reduced maintenance costs.

M&W requests that CSXT immediately reinstall the diamonds so that M&W can again cross CSXT's double tracked main line between Chicago and the northeastern United States so that M&W can move a minimal number of cars across CSXT, projected at between XXXXXXXX carloads per year. As explained below, there is considerable question as to whether there is a realistic basis for M&W's traffic projection. As a matter of black letter law, in abandonment proceedings, the Board has recognized that traffic projections without commitments from shippers are entitled to very little weight. CSXT contends that the Board should require more than unsupported statements from M&W before it accepts M&W's traffic projections. "Mere speculation about future traffic is not a sound basis upon which to deny an abandonment. *See, e.g., Idaho Northern & Pacific Railroad Company—Abandonment Exemption—In Wallowa and*

Union Counties, OR, STB Docket No. AB-433X (STB served Dec. 13, 2001). CSXT contends that it should not be a sound basis for requiring what may be an unnecessary expenditure.

By requiring CSXT to reinstall the diamonds, M&W would also adversely effect CSXT traffic on this mainline, which consists of about 1,700,000 carloads per year. As Mr. Thoburn states, the CSXT line is FRA Class IV with a maximum speed of 60 miles per hour. Under the CSXT Speed Policy at Railroad Crossings, CSXT trains must slow to 40 miles per hour when they cross diamonds. Mr. Thoburn points out that on average four minutes is added to the time each train is on the line. Because there are about 52 trains per day that use the CSXT line, reinstalling the diamonds would result in 208 minutes of lost capacity per day. It would also reduce the velocity of CSXT's main line and, on average, its entire system. As the Board was advised at the hearing on the 25th Anniversary of the Staggers Act, shippers consider the increase in velocity of trains by even one mile per hour as important. For its own unknown reasons, M&W is proposing to reduce the velocity of CSXT's trains.

M&W is also seeking to have CSXT incur substantial capital and rehabilitation costs, in addition to the operating costs of decelerating and then accelerating trains. A diamond crossing has about a three year useful life. At the end of that life span, CSXT will have to replace the diamonds with another set of diamonds costing about \$275,000. In addition, CSXT will have to maintain the diamonds at a cost of about 750 person-hours and \$35,000-\$45,000 per year.

CSXT was and remains of the opinion that sections 3c and 4 of the 1979 Agreement permitted the construction of a second track by CSXT. Moreover, the lack of protest by M&W at the time indicates that M&W did not believe CSXT had violated the 1979 Agreement at the time of the construction of the second track.

As Mr. Martin explains, CSXT does not operate in one direction on each track. Mr. Martin states that “The CSXT track is CTC (Centralized Traffic Control) signal controlled. As such, CSXT can and does use each of the two tracks of the double track for eastbound and westbound traffic. Neither track is dedicated to either eastbound or westbound traffic as Petitioners claim.”

CSXT’s removal of the diamonds was fully justified. Mr. Thoburn explains that he recommended removal of the diamonds because “a number of factors led me to conclude that it was appropriate to have the diamonds at Defiance removed. First, M&W had not moved a single car over the diamonds in 18 months. Second, the M&W embargoed a substantial part of its railroad south of the diamond. Finally, M&W had requested CSXT provide it with rail and ties to repair 15 miles of railroad free of charge, which CSXT refused to do.... [O]n November 18, 2002, at my direction, CSXT personnel removed the diamonds and stored them at the site of the crossing.”

CSXT removed the diamonds primarily to permit an increase in the velocity of its trains. CSXT also anticipated capital and maintenance savings from the removal of the diamonds. Finally, CSXT expected safer operations from replacing the divided rail of the diamonds with the continuous rail with which it replaced the diamonds. By removing the diamonds, CSXT avoids the capital expenditure of \$275,000 every three years to replace the diamonds. In addition, removal of the diamonds allows CSXT to avoid spending 750 person-hours on maintenance of the diamonds at a savings of about \$35,000-\$45,000 per year.

Mr. Davis explains that not only had M&W not used the diamond crossing for the 18 month period before the diamonds were removed, but its prospects for developing traffic

between Defiance and Cecil, OH are slight. Mr. Davis explains that M&W's use of its line between Defiance and Cecil, OH is limited because of track condition, which includes one highway rail crossing that has been paved over. Mr. Davis recites the history of M&W's embargoes on its line south of Defiance and includes photographs showing the poor condition of the line.

In evaluating the prospects on M&W generating substantial traffic, Mr. Davis states that "In my opinion, the M&W Southern Line between Defiance and Cecil is incapable of handling any significant volume of traffic. To the best of my knowledge, there are no local shippers on M&W's line between Defiance and Cecil, OH. I also believe that there is a very low probability of M&W locating a shipper on this portion of its line because of very poor track condition, lack of truck accessible highways, and the lack of utility infrastructure (water and sewer lines).... this is a remote area with little business."

The diamonds were still in place when M&W began detouring its traffic away from its line south of Defiance. M&W claimed no interference with service when CSXT was accommodating its detour requests. Moreover, as is demonstrated by the correspondence in the Petition, M&W was continually claiming that the need for service over the diamonds was eminent, but never reached the point of notifying CSXT that a specific shipper required service over the diamonds.

As M&W has explained, its line runs south of the diamonds to Woodburn, IN where it connects to the NS. M&W operates on the portion of its line near Woodburn. Had M&W maintained its line between Woodburn and Defiance, the portion of its line south of Defiance would not have been isolated by the removal of the diamonds by CSXT.

As Mr. Thoburn explains, CSXT removed the diamonds because M&W had not used them for over 18 months, because M&W had embargoed a portion of its railroad, and because M&W lacked the resources to repair its property as evidenced by M&W's request to CSXT for 15 miles of rail and ties at no charge. CSXT saw an opportunity to increase the velocity on its line and reduce its maintenance and capital costs, without any apparent harm to M&W. CSXT removed the diamonds for operational purposes, not commercial purposes. As Mr. Davis points out, the diamonds "were removed many months prior to the Standridge Plastics project even considering locating in Defiance, OH." M&W's claim that CSXT removed the diamonds for commercial purposes is wrong. Indeed, if CSXT had removed the diamonds for commercial purposes, CSXT would now be offering to construct an interchange track that will permit M&W to cross CSXT's line and potentially access the new industrial park. It must also be pointed out that if M&W had maintained its line south of Defiance, the removal of the diamonds would not have affected M&W's access to the industrial park.

M&W demands that CSXT immediately enter into a crossing and interlocking agreement with M&W concerning the crossing. However, by crossing, M&W obviously means the diamonds. If M&W does not mean the diamonds, then there is no dispute between M&W and CSXT, because of CSXT's offer to construct a connecting track. According to M&W, M&W and not CSXT terminated the 1979 Agreement. Having terminated an agreement, M&W now seeks to have the Board impose a new agreement. Again, if M&W is willing to be reasonable, CSXT does not see the need for the Board to impose an agreement. CSXT and M&W can negotiate an agreement concerning the construction and use of a connecting track that will permit M&W to cross CSXT's line at Defiance.

CSXT also opposes Petitioner's request that CSXT compensate Petitioners for the crossing rights. Construction and maintenance of the crossing track by CSXT without any contribution from M&W should more than compensate M&W for the use of its land. Indeed, other than requesting compensation, M&W has not identified how large the real estate is or its value. However, the real estate is only large enough to permit the CSXT line to cross over the M&W. Without the presence of CSXT, the real estate would have de minimus going concern value because Defiance would be an even less developed area. As Mr. Davis says, the area south of Defiance is a remote area with little business, which would substantially reduce the net liquidation value of the real estate. By constructing the crossing at a cost of about \$250,000, with a 12-year life and maintaining the crossing at a cost of about \$4,000 per year, CSXT is incurring costs of about \$25,000 per year so that M&W can cross CSXT's main east-west line. Surely, these costs should be more than sufficient compensation for the use of Petitioners' land.

M&W's demand for replacement of the diamonds is not justified. As previously stated, replacing the diamonds would require CSXT to reduce the speed of its trains, which would reduce the fluidity of its entire system. Moreover, CSXT would incur increased capital costs of \$275,000 every three years and increased maintenance costs of about \$35,000-\$45,000 per year.

M&W's traffic does not justify replacement of the diamonds. Indeed, the Board should discount all traffic projections made by M&W.

In discovery, CSXT sought information from M&W concerning its future traffic that could potentially move over the crossing of CSXT's line by M&W at Defiance, OH. M&W's responses are attached in Exhibit 3 - Confidential.

Interrogatory Number 7a asked “If the Crossing were replaced, identify the following: a. The annual number of carloads that M&W proposes to handle over the Crossing.”

In the response, M&W stated that

“XX
XX.”

CSXT posed a series of questions in Interrogatory Number 9 as follows: “If the Crossing were to be replaced, identify the following: a. The number of trains per day that M&W would operate over the Crossing; b. The average length and weight of each train to be operated over the Crossing; c. The number of days per week that M&W will operate over the Crossing; and d. The number, type, model and manufacturer of locomotive used to operate over the Crossing.”

In response to Interrogatory Number 9.a., M&W states that it “xxxxxxxxxxxxxxxxxxxx
xx.” M&W states that for each train operating over the crossing “xx
xx
xx
xx.” Response to Interrogatory Number 9.b. Finally, in response to Interrogatory Number 9.c. “xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
xx
xx.”

An analysis of these statements by M&W, which are required to be verified under the Board’s rules, demonstrates that M&W has no idea of what its future traffic or operations will be that will cross CSXT’s double main line at Defiance, OH.

Mr. Davis has addressed M&W's claim that it expects there to be substantial passenger traffic over M&W's line. His conclusion is that it is not possible because of the cost to upgrade M&W's line, the lack of funds available for such an upgrade, and the lack of demand for the service.

Finally, CSXT strongly opposes Petitioners' demand that they be able to require CSXT vacate the line in Defiance. If CSXT were required to break its main east-west line in Defiance, it would cause substantial disruption to CSXT and in the national rail system.

Mr. Martin indicates that on average 52 trains per day would be displaced, at an annual net cost to CSXT of about \$1 billion. CSXT doubts that there is sufficient capacity in the eastern United States to absorb on average 52 east west trains per day. As a result, it is likely that there would be substantial congestion on the nation's railroads and highways, as customers sought to move their goods. The attempt to reroute 1.7 million cars, trailers, and containers per year through the congested northeast would result in a melt down of rail service.

Moreover, Petitioners are asking the Board to authorize an illegal activity. CSXT operates a line of railroad in Defiance, OH. CSXT cannot lawfully remove the track without first obtaining abandonment authority under 49 U.S.C. § 10903. CSXT finds it unlikely that the Board would find that the public convenience and necessity would permit the abandonment of a line that handles about 1.7 million cars, trailers and containers per year. Without abandonment authority, CSXT would strenuously oppose any effort by Petitioners to evict CSXT from its line that crosses M&W.

Having fully described why the relief sought by M&W should be denied, CSXT believes that there is a solution that will provide M&W access across CSXT's main line in Defiance, OH.

CSXT'S PROPOSED SOLUTION

CSXT proposes to build one connecting track in the Southeast quadrant that will connect M&W's track to CSXT's No. 2 Main. CSXT currently operates a cross over track in the Southeast quadrant between CSXT's No. 1 Main and No. 2 Main. CSXT would construct the new connecting track at its sole expense and cost to CSXT standards and would maintain the tracks to CSXT's standards, also at CSXT's cost. CSXT estimates that it will cost about \$250,000 to construct this track and that it will have a useful life of about 12 years, four times the life of the diamond crossing. In addition, maintenance of the connecting track will only require about 75-person hours per year, at a cost of \$3,500 to \$4,500 per year. CSXT expects to pay the maintenance cost as well. In addition, CSXT trains would not have to slow down to operate over its main lines where they intersect with the connecting tracks.

Because of CSXT's heavy use of CSXT's No. 1 Main and No. 2 Main (about 1.7 million cars, trailers and containers per year), CSXT cannot guarantee M&W any fixed operating windows. Instead, CSXT will offer M&W close communication so that M&W can plan its train moves in advance and avoid undo delay in crossing the CSXT track. CSXT is merely asking M&W to be as flexible as CSXT is offering to be. CSXT will be able to guarantee M&W at least one crossing in each direction per day, and depending on the cooperation and coordination that can be developed between CSXT and M&W, perhaps more.

CSXT anticipates that it can complete construction of these connecting tracks within six months, assuming that there are not weather related delays.

CSXT will be responsible for the construction of the track, the maintenance of the track, the dispatching of the track, and control of the movement of trains over the track.

However, CSXT does not believe it is prudent or required to make this investment without some action on M&W's part to assure that the crossing would be used. CSXT should not be required to plow more money back into the crossing absent evidence that such an expenditure would make economic sense. *See Purcell v. United States*, 315 U.S. 381, 385 (1941).

In return for providing all of these services, CSXT is requesting certain commitments from M&W that will trigger CSXT's construction of the connecting track. First, M&W must commit to a plan and time frame to repair its track south of the crossing of CSXT so that it will be able to operate trains over the M&W line. M&W must also commit to maintain the M&W track in operable condition. Second, M&W must commit to be flexible and cooperate with CSXT in arranging for the operation over the crossing tracks and over CSXT's No. 1 Main and No. 2 Main. CSXT does not believe that these triggers are unreasonable or require M&W to incur any undue expense. CSXT does believe that these triggers provide a solution to an operating problem that will benefit both railroads. CSXT requests that the Board retain jurisdiction over this matter to resolve any dispute between M&W and CSXT as to whether M&W has met its commitments before CSXT incurs the expenses necessary to construct the connecting track.

CSXT proposes that it negotiate an operating agreement to memorialize rights and responsibilities of parties with M&W, and that the Board retain jurisdiction over this matter to resolve any issues that the parties not resolve.

CSXT's proposal follows the solution developed in *The Burlington Northern and Santa Fe Railway Company--Petition for Declaration or Prescription of Crossing, Trackage, or Joint*

Use Rights, STB Finance Docket No. 33740 (STB served May 13, 2003). In that proceeding, a diamond crossing was relocated by connecting track and the use of the main line. In adopting that solution, the Board concluded that “In this case, BNSF’s movement over the new configuration serves the same function as the movements over the old configuration.... Rather, as before, BNSF is merely utilizing the KJRY line as part of a continuous movement from BNSF main line track to BNSF main line track to access its own shippers on its own line.” *Id.* at 16.

CSXT is proposing that M&W operate over a new configuration serving the same function as the old configuration. However, the use of the connecting tracks instead of crossing diamonds will provide CSXT and the national rail system the benefit of not requiring CSXT to reduce speed when crossing the diamonds and thereby increasing the velocity and capacity of CSXT’s line. In addition, CSXT will reduce its capital and maintenance costs through the installation of a connecting track instead of a diamond. M&W will benefit through the reinstallation of a crossing of CSXT, at no expense to M&W.

CONCLUSION

CSXT respectfully requests that the Board deny all of the relief requested by Petitioners in the Petition and instead either adopt the solution proposed by CSXT, or order the parties to engage in negotiations for a period of 30 days based upon the solution proposed by CSXT.

Respectfully submitted,

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Dated: October 27, 2005

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served by overnight delivery on counsel for Maumee & Western Railroad Company and RMW Ventures LLC.

Louis E. Gitomer
October 27, 2005